No. 82-2105

In The
Supreme Court of the United States
October Term, 1983

MICHAEL VAN McDOUGALL,

Petitioner,

vs.

STATE OF NORTH CAROLINA,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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QUESTION PRESENTED

Are the North Carolina jury instructions for a death penalty sentencing hearing as used in the present matter before the Court consistent with federal constitutional principles generally and the holding of *Lockett v. Ohio*, 438 U. S. 586 (1978) specifically?

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BRIEF OF RESPONDENT STATE OF NORTH CAROLINA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 22 and in the manner provided by Rules 33 and 34 of the Supreme Court Rules, the State of North Carolina responds to the petition of Michael Van McDougall and requests that this Court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of North Carolina in this case is reported in *State v. McDougall*, 308 N. C. 1, 301 S. E. 2d 308 (1982).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U. S. C. § 1257(3).

STATEMENT OF THE CASE

In the early morning of August 21, 1979, Michael Van McDougall, a convicted rapist and burglar from Georgia, was arrested for the murder of Diane Parker and for the felonious assault on Vicki Dunno after he was found, smeared with blood, hiding in the bushes near Diane's partially disrobed body. When apprehended, McDougall had the presence of mind to demand a lawyer (R. 43). He also developed amnesia about the events in question.

At the September, 1979 term of the Mecklenburg County Grand Jury, McDougall was indicted for the first degree murder of Diane Parker (79 CR 47697) and assault with a deadly weapon with intent to kill inflicting serious bodily injury on Vicki Dunno (79 CR 47734). On October 11, 1979 the defense requested a continuance until November, 1979. On November 13, 1979, the Mecklenburg County Grand Jury indicted McDougall for first de-

gree kidnapping of Diane Parker (79 CR 067081), first degree kidnapping of Vicki Dunno (79 CR 067084), and first degree burglary (79 CR 067087). These indictments, along with the indictments handed down in September, 1979, were all based upon the events happening August 21, 1979.

On November 15, 1979 the defense filed a second motion to continue, this time until February 4, 1980 (R. 19). On January 18, 1980 the defendant moved for a continuance until March 17, 1980 (R. 39). On April 18, 1980 the defense requested a continuance from the May 12, 1980 trial date until June 9, 1980 due to Dr. Teich's (the defense's chief psychiatrist) desire to vacation in China and attend some workshops in San Francisco (R. 63-64). On June 5, 1980 the defense attempted to get yet another continuance on the ground that the petitioner needed additional time for further treatment of his alleged amnesia. This motion was denied and the case went to trial.

The State of North Carolina presented evidence which showed the following:

At approximately 2:30 a. m., August 21, 1979, Officer W. K. Crisler observed a person later identified as Michael Van McDougall driving a flatbed truck at the intersection of Fairview and Sardis Road in Charlotte, North Carolina (T. 1661). Because in the mind of Officer Crisler it was unusual for such a truck to be driven at that time of night, he observed the truck closely. It was being driven in a normal manner (T. 1663). The intersection of Fairview and Sardis Road is located some one and one-half to two miles from 1420 Blueberry Lane in the City of Charlotte.

Vicki Dunno and Diane Parker shared a house at 1420 Blueberry Lane.

At approximately 2:45 a.m., Vicki and Diane were awakened by the doorbell ringing (T. 1922). They went to their front door and heard a male voice begging to get in the house. This person said his wife had cut her leg "real bad," that he needed bandages and alcohol, and he needed to call a doctor (T. 1923). He continued to beg for help. Diane went to the bathroom, got alcohol and bandages and put them outside the back door. She then came back to the front of the house. When the person began calling Diane by name, saying he needed to talk to her, that he needed help, that his wife was hurt, Diane answered him (T. 1925). He then said he was her neighbor, Mike, that his wife was hurt "really badly" and that he needed help. After he continued pleading and begging to get into the house, Diane Parker finally opened the door and let the petitioner, Michael Van McDougall, into the house (T. 1926). The three persons walked into the kitchen where Vicki Dunno got the telephone directory off the refrigerator to find a doctor to call (T. 1928). While Vicki was looking up a number, the defendant walked from the kitchen to the den and obviously started "checking out" the house. Diane took the telephone book from Vicki and began to dial for help (T. 1930). McDougall came back from the den into the kitchen and picked up a butcher knife from the women's cutting board. Vicki told Diane to look out, he had a knife (T. 1930). McDougall grabbed Diane by the arm, put the knife in front of her face and told her to put down the telephone (T. 1930). Diane tried to get away from him and in the struggle the two knocked over one of the kitchen stools and the telephone was

knocked out of Diane's hand. McDougall and Diane fell to the floor. Vicki ran out the front door to try to get help (T. 1931). When Vicki got to the grass, it was wet and she slipped and fell. Her glasses flew off. She was trying to find her glasses when McDougall came running out of the house, grabbed Vicki by the arm and told her she wasn't going anywhere (T. 1932). Diane came out of the house with a knife in her hand and told McDougall if he hurt Vicki, she'd kill him (T. 1933). McDougall realized Diane had a knife. He let go of Vicki and wrestled Diane down in some bushes in front of their porch. Vicki screamed at Diane not to fight because she knew McDougall had a knife. The knife Diane had was thrown down in the driveway and Diane stopped struggling (T. 1934). McDougall grabbed Diane and Vicki by the back of the hair and dragged both of them back into the house. Diane was bleeding from the nose and forehead by then (T. 1935). McDougall weighed two hundred and twenty pounds; he was six feet two inches tall. Vicki was five feet ten inches tall and weighed one hundred and thirty pounds. Diane was only five feet two inches tall and weighed one hundred and twenty-five pounds.

McDougall forced Vicki to get her car keys and give those keys to him. He then dragged Diane and Vicki out to Vicki's automobile. He asked Vicki which key was the trunk key. He told Diane he was going to put them in the trunk until he got where they were going; then he'd let them out (T. 1937). Diane screamed for Vicki not to let him have the keys. Vicki threw the keys away. McDougall then threw Vicki to the ground and started stabbing her. Vicki screamed to Diane that he was stabbing her. Diane ran for help in the direction of the neighbor's

house (T. 1937). When McDougall saw her run away, he got up and chased her (T. 1938) and caught Diane. Vicki crawled back to the house and called for help (T. 1939). Lynda McDougall, the wife of the defendant, telephoned and asked what was happening. Vicki told her she had been stabbed and that Diane was outside with the assailant.

When the police arrived they found Diane's body sprawled in front of 1400 Blueberry Lane, McDougall's home. Diane's body was clothed only with a nightgown which had been pulled up to her chest, exposing her pubic area and one breast. Her knees were pulled up and her legs were parted wide. She had been stabbed twenty-two times; most of the wounds were inflicted when she was in a prone position. She also had multiple contusions on her body.

The officers brought in searchlights to aid in the investigation, and, once these lights were operating, McDougall came out from behind some bushes saying, "I give up. Okay, I give up." He was smeared with blood. The blood on McDougall was consistent with Diane Parker's blood type.

Vicki Dunno, rushed to a hospital, survived her nine stab wounds although she has been severely scarred.

McDougall put on evidence indicating that he suffered from a cocaine induced psychosis as well as underlying depression and organic brain damage. For some two weeks he put on evidence that his psychosis stemmed from childhood experiences such as his grandfather's suicide, his father's murder when McDougall was fourteen (T. 2677), his brother's and his horse being poisoned (T. 2731),

and his brother's and his experiences killing cats by dropping mortar blocks on them (T. 2751).

On the night of the arrest, McDougall allegedly injected nearly five grams of cocaine before he invaded Diane and Vicki's home. However, blood analysis failed to reveal significant amounts of cocaine or its metabolites in his blood.

Though initially suffering from amnesia concerning the events in question, McDougall recovered his memory sufficiently by trial time to testify through his main psychiatrist, Dr. Teich,[1] that he thought he was fighting his mother who was beating him with an automobile antenna when he was, in actuality, stabbing Vicki Dunno (9 times) and then, running after, capturing, stabbing (22 times) and attempting to rape Diane Parker.

The jury convicted McDougall of first degree murder (felony murder); kidnapping Diane Parker, and assault with a deadly weapon with intent to kill, inflicting serious bodily injury on Vicki Dunno.

In the sentencing hearing on the first degree murder conviction, the State presented evidence of McDougall's

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[1]Teich, a New York psychiatrist, was revealed during cross-examination to have been fired from his Health Services Agency job in New York, to be spending much of his time running basket import businesses called the Philippine Collection and Blackbeard and the Gypsy, and doing all of his psychiatric practice in criminal trials. He gave McDougall a series of diagnoses identical to those given by him in three other criminal trials, and, in fact, he had been a witness for chief defense counsel, Jerry Paul, in a disciplinary hearing in which he also gave a similar diagnosis of Paul (T. 3061-3134). In violation of a court order, Dr. Teich made available to the news media during jury deliberation a film of McDougall "under hypnosis" which had been ruled inadmissible by the trial court (T. 4190-4195).

prior convictions in Georgia for burglary (two counts) and rape. Through cross-examination of McDougall during the sentencing hearing, it was brought out that McDougall had been a drug dealer (T. 4375) and had often used cocaine (T. 4379-4380).

McDougall presented evidence of his lack of capacity and his suffering from emotional or mental disease.

The jury found three statutory aggravating circumstances existed, found mitigating circumstances existed, found that the aggravating circumstances outweighed the mitigating circumstances and that the aggravating circumstances were sufficiently substantial to warrant a sentence of death. McDougall was sentenced accordingly. He also received a life sentence for kidnapping and a twenty year sentence for the assault. He entered notice of appeal to the North Carolina Supreme Court. In this appeal, petitioner excepted to the sentencing instructions of the trial court on the basis that the jury should not be required to return a recommendation of death if the issues were all answered in the affirmative (T. 4475-4477). Petitioner also asserted that the trial court's submission of the penalty phase issues in this case (specifically the fourth issue), and his charge violated the requirements of *Lockett v. Ohio,* 438 U. S. 586 (1978), since the fourth issue arguably could be read to exclude consideration of mitigating circumstances, and denied McDougall due process of law (petitioner's state court brief, Argument 5). The State responded to the petitioner's contentions by stating that the instructions were given and the penalty issues presented in a manner consistent with established North Carolina case law and the statute itself (respond-

ent's state court brief, Argument 5). The North Carolina Supreme Court ruled, as a matter of state law, that "the fourth issue is not an isolated, independent question that may be answered without reference to the other issues and circumstances of the case. This is manifested by the language of the General Assembly—'[b]ased on these considerations' should the defendant be sentenced to death or life imprisonment. N. C. Gen. Stat. 15A-2000(b)(3) (Cum. Supp. 1981)." The Court further ruled that when considered contextually, the charge given in this case complied with State law and also was constitutionally adequate pursuant to the requirements of *Lockett v. Ohio, supra.* The North Carolina Supreme Court then affirmed the convictions and the sentences imposed.

REASONS WHY THE WRIT SHOULD NOT ISSUE

The North Carolina jury instructions for a death penalty sentencing hearing approved by the North Carolina Supreme Court and used in this case are consistent with the holding of this Court in Lockett v. Ohio, 438 U. S. 586 (1978).

The Supreme Court of North Carolina, in *State v. Pinch,* 306 N. C. 1, 292 S. E. 2d 203 (1982), *cert. denied* — U. S. —, 74 L. Ed. 2d 622 (1982); *State v. Williams,* 305 N. C. 656, 292 S. E. 2d 243 (1982), *cert. denied,* — U. S. —, 74 L. Ed. 2d 622 (1982); and *State v. Smith,* 305 N. C. 691, 292 S. E. 2d 264 (1982); *cert. denied* — U. S. —, 74 L. Ed. 2d 622 (1982), as a matter of State law, construed the language of G. S. 15A-2000(b) and (c) to require the trial

court to charge the jury in a sentencing hearing in a first degree murder case that if the jury found (1) beyond a reasonable doubt that one or more statutory aggravating factors exist, (2) that beyond a reasonable doubt these aggravating factors are sufficiently substantial to warrant imposition of the death penalty, (3) mitigating circumstances exist, and (4) beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances, then the jury must recommend a sentence of death.

In his concurrence in the denial of certiorari in *Pinch, Smith* and *Williams,* Justice Stevens expressed concern about whether or not this formula complied with the holding of *Lockett v. Ohio, supra,* by limiting the use of the mitigating factors. In the next case before the North Carolina Supreme Court after this concurrence, *State v. McDougall, supra,* that Court ruled as a matter of State law that G. S. 15A-2000(b)(3) mandated that the written finding made by the jury pursuant to G. S. 15A-2000(c)(3) "that the statutory aggravating circumstance or circumstances found by the jury are sufficiently substantial to call for the imposition of the death penalty" be answered with reference to the other issues and circumstances of the case, and that "the jury must consider the aggravating circumstances found, the mitigating circumstances found, and the degree to which the aggravating circumstances outweigh the mitigating circumstances." 308 N. C. at 31. The Court then found when considered contextually, the charge given the jury complied with the requirements of the statute and was constitutional.

The petitioner does not now claim that the formula articulated by the Court in this matter is unconstitutional.

Indeed, the Court's interpretation of 15A-2000(c)(3) is precisely the one suggested in *Smith v. North Carolina, supra.* Rather, he merely alleges the North Carolina Supreme Court erred in ruling that the instructions, when read contextually, fall within the perceived requirements of G. S. 15A-2000. This issue is hardly "an important question of federal law which has not been, but should be, settled by this Court. . . ." Rule 17(c), Supreme Court Rules. Likewise, this clearly is not an issue where the North Carolina Supreme Court has decided "a federal question in a way in conflict with applicable decisions of this Court." Rule 17(c), Supreme Court Rules.

More importantly, even assuming that North Carolina had not modified the instructions as approved in *State v. Pinch, supra; State v. Williams, supra;* and *State v. Smith, supra,* the North Carolina sentencing instructions generally and the instructions given in this case specifically pass constitutional muster.

The Supreme Court cases indicate that statutory aggravating circumstances play a constitutionally necessary function of circumscribing the class of persons eligible for the death penalty. *Zant v. Stephens,* — U. S. — (1983). In Georgia and Florida, statutory aggravating circumstances found in the punishment phase of the trial separate the class of cases in which the death penalty is potentially appropriate from other first degree murders. *Zant v. Stephens, supra; Barclay v. Florida,* — U. S. — (1983). In Texas, this narrowing takes place by limiting by statute the categories of murders for which a death sentence may be imposed: *Jurek v. Texas,* 428 U. S. 262 (1976). As this Court noted, the action of Texas in narrowing the categories of murders for which a death penalty may be

imposed is the functional equivalent to the use of aggravating circumstances. *Jurek v. Texas, supra.* In North Carolina, the narrowing of the class prior to any formal balancing of aggravating and mitigating factors takes place in two stages. First, the jury must find aggravating factors to be present. This initial inquiry is not enough, however, to call for a formal balancing of those features of aggravation against any mitigating features. The further inquiry required by North Carolina is whether those aggravating factors are so substantial that the death penalty should be considered in this case. G.S. 15A-2000(c)(3). If the instructions given by the North Carolina trial court on the substantiality issue were insufficient to inform the jury that the finding included considering factors in mitigation, this still does not render the North Carolina sentencing scheme unconstitutional. This issue even without mitigating features considered further limits that class of cases in which the death penalty is appropriate. As noted in Footnote 1 in the concurrence in *Barclay v. Florida, supra,* "the Constitution does not require that nonstatutory mitigating circumstances be considered before the legal threshold is crossed and the defendant is found to be eligible for the death sentence. It is constitutionally acceptable to bring such evidence into the decision making process as part of the discretionary post threshold determination." Thus, North Carolina, no matter how this substantiality issue is interpreted, actually has more of the general narrowing of the class of persons eligible for the death penalty than does Georgia, Texas, and Florida, all of whose statutes and sentencing procedures have been found constitutionally permissible. *Jurek v. Texas, supra; Gregg v. Georgia,* 428 U. S. 153 (1976); *Barclay v. Florida, supra.*

After the class of persons has been narrowed, there is no constitutional requirement that any specific standards for balancing the features in aggravation against the features in mitigation be followed. (*Zant v. Stephens, supra; Jurek v. Texas, supra*) so long as the mitigating factors the jury may consider are not limited: *Lockett v. Ohio, supra.* In North Carolina, as in Florida, there is a specific balancing of aggravating and mitigating factors, thus insuring more procedural regularity than is constitutionally required. *Zant v. Stephens, supra.* The North Carolina instructions in no way limit what the jury may consider in mitigation or what weight to assign such factors.

Thus, North Carolina's jury instructions, even when read to remove consideration of the mitigating factors in the substantiality finding, are not unconstitutional since there is no limitation in the instructions on what the jury may consider in mitigation, *Lockett v. Ohio, supra,* and there is a full consideration of the mitigating factors in the balancing procedure.

In the present matter before the Court, the trial judge presented the issues to the jury in such a way that the substantiality finding was made by the jury after the aggravating and mitigating features were balanced. However, this juxtaposition of the issues does not render the instructions in this case violative of due process. That the final threshold was passed after the balancing is of no constitutional significance since it is clear this Court has approved several different ways of reaching the threshold of cases and the using of mitigating factors: *Jurek v. Texas, supra; Barclay v. Florida, supra; Zant v. Stephens, supra.* The final inquiry, since there can be "no per-

fect procedure for deciding in which cases governmental authority should be used to impose death," *Lockett v. Ohio, supra,* at 605 is whether the procedure employed in this case by the North Carolina trial court "assures reliability in the determination that 'death is the appropriate punishment in a specific case.'" *Smith v. North Carolina, supra,* at p. 622. In the matter before the Court, no matter how narrowly the substantiality instruction is read, the procedure employed by North Carolina clearly assured the reliability in the determination of the death sentence the Constitution demands.

Accordingly, this Court should deny McDougall's petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, the State of North Carolina submits that Michael Van McDougall's petition for writ of certiorari should be denied.

Respectfully submitted,

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